No. 12,023

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HONOLULU PLANTATION COMPANY, APPELLEE

AND

HONOLULU PLANTATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

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ARGUMENT

The Award Is For the Land That Was Taken and Not For Damages To the Remaining Land

The United States condemned lands which had been leased to the Honolulu Plantation Company. The company had invested in these lands an average of $1,000 an acre and ordinarily would have shared in the compensation awarded for them. But it had agreed with the fee owners that in the event of condemnation the

entire compensation should be paid to the owners. Consequently, it lost its investment. It is the position of the Government that in the proceedings now being reviewed by this Court, the company under the guise of a claim for severance damages sought to recover that loss.

True, it purported to claim only for damages to its *remaining* property. However, it produced testimony as to the value of the whole plantation before the takings and the value thereafter of the remainder. This is the accepted measure where compensation is sought for both property taken and severance damages to the remainder. Necessarily, it comprehends, in addition to the damages suffered by what is left, the value of the land that has been taken. The company's witnesses, in testifying to the value of all the property before condemnation, appraised it at a figure arrived at by multiplying the number of acres in the plantation at that time by $1,000. Next, in testifying to the value of the property remaining after condemnation, they appraised it at a figure arrived at by multiplying the diminished number of acres by $1,000. In the words of the trial court (R. 490), they testified that "a buyer * * * would pay less, at the rate of $1,000 an acre for each acre taken, for what was left of the plantation's physical property and its permanent improvements."

This is testimony to the obvious. It is simply that the larger plantation that existed before the condemnation would sell for more—$1,000 an acre more—than the smaller one that remained after the condemnation. And, because the value of the plantation diminished at an exact rate per acre as the plantation lost land, the testimony discloses that the remainder standing alone was worth as much as when it had been part of the larger plantation and that the damages claimed were on account of the lands taken. If, as the trial court con-

cluded, the company's witnesses had meant (R. 491) that the company's "remaining property decreased in value at the rate of $1,000 an acre for each cane acre taken," they would have discredited completely their theory of appraisal because the remainder would have been worth more than $1,000 an acre before condemnation.

If support were needed for the Government's position, it is afforded by the company's answer brief. Not an item of the foregoing (a fair summary, it is submitted, of the opening brief for the United States) has been contradicted by the Honolulu Plantation Company.

This Court is not helped by the company's extensive argument (pp. 3-12, 18-35) that severance damages are a part of just compensation. This principle was succinctly stated in the Government's opening brief (pp. 8-9). Equally inapropos is the company's invocation (pp. 33-39) of the well-settled principle now embodied in the Rules of Civil Procedure (52(a)) that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In this case there are no conflicting witnesses and consequently no occasion to pass upon their credibility. The company furnished all of the witnesses for severance damage and they agreed as to its amount. From this undisputed testimony the trial court drew the inference of damage to the remainder of the property which resulted in the judgment now under review. As this Court has held, it is at least equally capable of drawing a conclusion as to the meaning of this testimony and so is not bound by the conclusion reached by the trial judge. *Adams County* v. *Northern Pac. Ry. Co.,* 115 F. 2d 768, 779 (1940); *Smith* v. *Royal Ins. Co.,* 125 F. 2d 222, 224 (1942), certiorari denied 316 U. S. 695; *Carr* v. *Southern Pac. Co.,* 128 F. 2d 764, 768 (1942).

The appellate courts of other circuits without exception apply the same rule. *Kuhn* v. *Princess Lida of Thurn and Taxis,* 119 F. 2d 704, 705-706 (C.C.A. 3, 1941); *Stubbs* v. *Fulton Nat. Bank of Atlanta,* 146 F. 2d 558, 560 (C.C.A. 5, 1945), certiorari denied 325 U. S. 864; *Campana Corporation* v. *Harrison,* 114 F. 2d 400, 405-406 (C.C.A. 7, 1940); *Sun Insurance Office* v. *Be-Mac Transport Co.,* 132 F. 2d 535, 536 (C.C.A. 8, 1942); *Crutcher* v. *Joyce,* 146 F. 2d 518, 520 (C.C.A. 10, 1945).

The company admits (pp. 13-16) that it relinquished in its leases its right to share in the compensation awarded for the condemned lands. Its argument that it retained the right to claim severance damages would knock down another straw man: the Government makes no contention to the contrary.

The nature of the claim brought forward in the case at bar is of course disclosed by the company's earlier unsuccessful petition to Congress. The company does not deny that the claim was accurately described in the Government's opening brief. Its argument (pp. 5, 17) that the Government has gone outside the record is unwarranted. The statements in the Government's brief were derived from the committee report which is in the record (R. 1542-1566). It is assumed that the company will not assert that in recommending action in its favor the committee misunderstood or misstated its claim.

The company's explanation that the $1,000 an acre used by its witnesses represented average rather than actual investment per acre (pp. 5-12) is unnecessary. That was made plain in the Government's opening brief at pp. 3-5 and 10 and its appeal in no degree depends upon a misunderstanding of the company's method of valuation. When regard is had to the diverse character of the congeries of properties involved, it is manifest that the method was highly formulary and unrealistic

and hence objectionable. See e.g., *Minnesota Rate Cases,* 230 U. S. 352, 434. No doubt it was employed as an apt device for setting up the $1,000-an-acre claim. The desired result could not have been produced by acceptable appraisals. In any event, the suggestion that each acre taken was not in fact worth $1,000 falls far short of an assertion that any or all of them were valueless. Since the difference between value before and after condemnation necessarily includes whatever value inhered in the condemned acreage, it follows that the award (calculated on that basis) is for more than the diminution in the value of the remainder. Therefore, even if the company were entitled to something, it clearly cannot recover the $440,175 awarded by the judgment appealed from.

CONCLUSION

For the foregoing reasons, it is submitted that so much of the judgment as awards the company compensation for "severance damages" should be reversed.

Respectfully,

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